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No. 92-396

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ASTRONICS CORPORATION and
RODGARD CORPORATION,

Petitioners,

v.

THEODORE C. PATECELL and
THE PATECELL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE DISTRICT OF COLUMBIA CHAPTER OF THE FEDERAL BAR ASSOCIATION AND OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Amici respectfully request leave to file the attached brief on behalf of the District of Columbia Chapter of the Federal Bar Association and of The Bar Association of the District of Columbia, in support of the Petition for Certiorari of Astronics Corporation and Rodgard Corporation. Petitioners have consented to the filing of this brief. A copy of Petitioners' letter of consent has been filed with the Clerk of the Court. Respondents have refused consent.

The District of Columbia Chapter of the Federal Bar Association ("DCFBA"), a voluntary organization, has more than 2,500 members who practice in the Federal Circuit and other circuits throughout the

country. Dedicated to representing federal attorneys, DCFBA members include Members of Congress, agency counsel and general counsel, sole practitioners, consumer activists, corporate attorneys and members of law firms, large and small. The Bar Association of the District of Columbia ("BADC"), established in 1871, is also a voluntary organization, consisting of 5,500 members. Its members are lawyers who practice in federal and local courts in the District of Columbia, including the Federal Circuit.

Both amici are concerned with issues of general significance involving federal practice. They seek to keep their members informed of, and to provide meaningful impact on, matters touching upon these issues. The members of both organizations have great professional interest in the matter as to which review is sought. Amici are familiar with the issue involved and the scope of its presentation. The lawyers who belong to these organizations are very much aware of the problem presented when appellate courts render decisions without explanation. It is the view of amici that review by this Court would constructively address a longstanding major problem, with the result that the administration of justice and fairness to litigants will be enhanced. The attached brief sets forth additional authorities which are presented in order to assist this Court in determining whether to review the issue presented in the Petition for Certiorari.

Because of the importance of the issue presented to the administration of justice, amici respectfully request this Court to grant the Motion for Leave to file the attached brief *Amici Curiae*.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
INTERESTS OF THE AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	12

TABLE OF AUTHORITIES

CASES:	Page
Davis v. Clark, 404 F.2d 1356 (D.C. Cir. 1968) ...	9-11
Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971)	10
In re Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299 (7th Cir. 1988)	11
Taylor v. McKeithen, 407 U.S. 191 (1972)	11
COURT RULES:	
Sup. Ct. R. 10.1(a)	4
Sup. Ct. R. 10.1(c)	4
TREATISES AND ARTICLES:	
Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224 (1975)	7,8
Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 UCLA L. Rev. 432 (1976)	5,7,9
Morrison, *Decisions Without Reasons: A Crisis in the D.C. Circuit*, District Lawyer 36 (Fall 1976)	6,8
Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 Md. L. Rev. 766 (1983)	8,11
MISCELLANEOUS:	
Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* (June 1975)	6-9
Scalia, *The Press and the Law*, speech given at Washington Hebrew Congregation, March 4, 1990	5

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PRELIMINARY STATEMENT

The District of Columbia Chapter of the Federal Bar Association ("DCFBA") and The Bar Association of the District of Columbia ("BADC") submit this brief *Amici Curiae* in support of the petition for certiorari filed by Astronics Corporation and Rodgard Corporation.

INTERESTS OF THE AMICI

The DCFBA, a voluntary organization, has more than 2,500 members who practice in the Federal Cir-

cuit and other circuits throughout the country. Dedicated to representing federal attorneys, DCFBA members include Members of Congress, agency counsel and general counsel, sole practitioners, consumer activists, corporate attorneys and associates and members of law firms, large and small. The BADC, established in 1871, is also a voluntary organization, consisting of 5,500 members. Its members are lawyers who practice in federal and local courts in the District of Columbia including the Federal Circuit.

Both amici are concerned with issues of general significance involving federal practice. They seek to keep their members informed of, and to provide meaningful impact on, matters touching upon these issues. The members of both organizations have great professional interest in the matter as to which review is sought. Amici are familiar with the issue involved and the scope of its presentation. The lawyers who belong to these organizations are very much aware of the problem presented when appellate courts render decisions without explanation. It is the view of amici that review by this Court would constructively address a longstanding major problem, with the result that the administration of justice and fairness to litigants will be enhanced.

Amici appreciate the opportunity to present these views and urge the Court to grant the petition for certiorari.

SUMMARY OF ARGUMENT

The administration of justice and fairness to litigants suffer when an appellate court decides a case without explanation. The absence of reasons makes it

difficult to evaluate the correctness of the decision. The absence of valid, stated reasons undermines public confidence in the judiciary. Also, the need to explain decisions helps to assure equal justice, by promoting consistency within and among circuits.

When a court must give reasons, this contributes to the correctness of its decisions. This is so because an erroneous decision may be difficult to justify in stated reasons, and because the statement of reasons will indicate whether all dispositive issues have been addressed. The absence of reasons makes it difficult for an attorney to understand a loss and to explain it to the client.

Decisions without reasons have long been of grave concern to the bench and bar. Furthermore, just as appellate courts have required administrative agencies and trial courts to give reasons to assure the integrity of their decisionmaking, so too appellate courts should meet their own standard. When appellate courts do not give reasons, the growth of the law may be distorted in that one panel may be explanatory and another silent in deciding the same issue in conflicting or contrary directions. For this Court to give guidance to the courts of appeals on the standards that should govern the need for reasons would not unnecessarily intrude upon their authority to conduct their own decisionmaking. Rather, such guidance would provide a needed corrective to enhance the administration of justice.

Respected jurists have noted that the giving of reasons is not excessively onerous, especially when a court has already given a matter careful consideration in rendering a decision. The petition for certiorari seeks measured relief, in not asking for an across-

the-board requirement that reasons be given, but rather that this Court set standards governing the need for reasons.

ARGUMENT

REASONS FOR GRANTING THE WRIT

The petition for certiorari presents an issue that is intrinsic to the nature of our judicial process and fundamental to the administration of justice: What are the standards that must be applied in determining the explanation a court must give for its decisions? This is "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). In addition, recognizing that Rule 10 "neither control[s] nor fully measur[es] the Court's discretion," we submit that the petition also satisfies Rule 10.1(a), in that the court below "has so far departed from [what should be] the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." The fact that the issuance of decisions without reasons is "accepted" among several circuits makes certiorari and supervision by this Court more, rather than less, necessary.

1. Initially, and in order to put the reasons for granting the writ in context, we note that this is *not* a case in which it is readily inferable that the only issue is the sufficiency of the evidence. Here, the court of appeals was presented with the assertion that there were legal errors concerning the instructions. The unexplained affirmance does not permit understanding or analysis of the court's rationale in rejecting the contention that such errors occurred. Nor

can the reasons for affirmance be determined by examination of the decision of the district court. We note that the petition for certiorari does not contend that, if the only issue had been sufficiency of the evidence, petitioner would be seeking review. *Cf.* Petition for Certiorari at 6. Whether the Federal Circuit deemed its action authorized by its Rule 36 or by its inherent appellate authority, its unexplained action raises a question of general importance within the federal judicial system.

2. When a court rules without giving reasons, its decision is difficult to evaluate. It is necessary to speculate as to the basis for the ruling. One cannot necessarily ascertain whether the decision turned on legal issues, or purely on factual considerations. It may not be possible to determine whether all pertinent legal issues were considered; whether the court decided that legal precedent determined the result; and, if so, whether the court adequately considered proffered distinctions.

Mr. Justice Scalia has said that, unlike an umpire in baseball, a judge must give reasons; this is the long tradition of western jurisprudence; the outcome and consequence are not sufficient to tell whether a decision is a good one; one must know the reasons given. Scalia, *The Press and the Law*, speech given at Washington Hebrew Congregation, March 4, 1990. (Available on tape from Audio Responses, Inc., Rockville, Maryland; the tape has the title, "Reflections on the Constitution," Justice Scalia's original topic.)

As the late Judge Harold Leventhal wrote, "[s]ome brief indication of reasons can be retained, enough to serve the appearance of justice and *the reality of consideration*." Leventhal, *Appellate Procedures: Design,*

Patchwork, and Managed Flexibility, 23 UCLA L. Rev. 432, 441 (1976) (emphasis added). The Commission on Revision of the Federal Court Appellate System stated that three-fourths of attorneys surveyed "agreed that it is important for the courts at least to issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be assured that the attention of at least one judge was given to the case." Commission on Revision of the Federal Court Appellate System (hereinafter "Commission"), *Structure and Internal Procedures: Recommendations for Change* (June 1975) (hereinafter "Commiss on Report") at 49. The Commission also referred to "the need to provide the Supreme Court with insight into the court of appeals' reasoning when the Justices consider petitions for certiorari." *Id.*

3. The judiciary should be concerned about the respect that is afforded to its decisionmaking process, and about the loss in that respect that results from unexplained decisionmaking. "In the ultimate, and the point bears reiteration, the goal is not only to assure continued acceptance of the rule of law in a democratic society, but also general satisfaction with its administration and operation." *Commission Report* at 53. The Commission also stated: "If the lawyers' perceptions are to be credited, the risk of harm to public confidence in the judicial system from unexplained decisions could become serious." *Id.* at 49. Although said in the context of another circuit, Alan B. Morrison's comment is apt: "Accountability of a federal judge lies in the moral and logical force of his rulings, a force that is totally lacking in the D.C. Circuit's decisions in which no opinion is written." Morrison,

Decisions Without Reasons: A Crisis in the D.C. Circuit, District Lawyer 36, 38 (Fall 1976).

4. Explaining decisions helps to assure that equal justice will be provided to litigants. If a panel of a court of appeals rules in a particular direction without explanation, a later panel may rule in an inconsistent fashion on the same fact pattern because it is unaware of the prior decision or its rationale. The Commission referred to "the obligation to maintain consistency between cases presenting essentially the same legal issues," and to "the problems of even-handedness and consistency in a common law system." *Commission Report* 51, 52. James N. Gardner has noted:

> The heavy caseloads in federal appellate courts make it all but inevitable that judges occasionally, through inadvertence, will reach results at odds with prior decisions.

Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224, 1225 (1975). When reasons are not stated, it makes it more difficult to assure equal justice by the usual "mechanisms for correction." *Id.*. He also refers to a "hidden conflict" between published and unpublished opinions. *Id.* at 1224.

5. Explaining decisions also helps to assure correctness in decisionmaking. Sometimes a judge may arrive at an apparently correct conclusion, only to find that "it doesn't write." The need to put justification into words helps to expose flaws in reasoning. Judge Leventhal has said: "[T]here is accountability in the giving of reasons." 23 UCLA L. Rev. at 438. When opinions are written, "[t]here is the need to

formulate carefully the reasoning of the court, to review the opinions of one's colleagues, to edit and reedit draft manuscripts in the effort to achieve consensus in the panel." *Commission Report* at 50. These considerations may apply to a lesser extent in the case of memoranda containing a brief statement of reasons. Nevertheless, when there is no explanation at all, there is no need to take care in preparing the reasoning, to ascertain the views of other judges on a draft and to achieve consensus.

Thus, the steps which help to obtain correctness are simply not taken when an order is issued without explanation. Referring to unpublished opinions, Gardner stated: "Freedom from the pressure of critical eyes may indeed allow a judge to write his opinions with greater dispatch, but does it not also create an unwholesome temptation to pay less than meticulous attention to the fine points of an appellant's argument?" 61 A.B.A. J. at 1225. His observation applies with all the more force where no reasons at all are given.

6. A basic aim of the judicial process is to render justice to the parties in particular cases. (The other basic aim is to develop a sound body of law for courts and for society at large.) When an attorney does not understand his or her loss, and is not in a position to explain the loss to the client, it is not clear that justice has been done. Certainly, the appearance of justice will not have been served. *See* Morrison, District Lawyer at 36; *Commission Report* at 49.

7. The absence of reasons accompanying decisions has been of considerable concern to the bench and to the Bar. *See* Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Chal-*

lenge?, 42 Md. L. Rev. 766, 782 (1983) ("My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmance, dismissal, or reversal does not."). The Commission stated:

> The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write "at least a brief statement of the reasons for their decisions."

Commission Report at 49.

We are not asking the court to decide a due process issue here. The supervisory authority of this Court is sufficient to permit it to set standards for explanation of judicial decisions. Still, the fact that so many lawyers thought that the Due Process Clause was implicated emphasizes that the issue is serious and that it deserves review. Such concerns have been expressed many times. Judge Leventhal wrote: "Grave questions are raised when a court uses 'judgments' and 'orders' to dispense with any indication of reasons." 23 UCLA L. Rev. at 440. *See also, e.g., Davis v. Clark*, 404 F.2d 1356, 1358 (D.C. Cir. 1968) (statement of Judge Tamm).

8. Courts of appeals have faulted district courts and administrative agencies for the failure to provide rea-

sons. No reason appears why the courts of appeals should be held to a lesser standard of review. In fact, because *stare decisis* applies less strictly to administrative agencies than to courts, there is more reason for courts to have to articulate their reasons.

In *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971), the court referred to "the requirement that administrators articulate the facts on which they base their decisions," and the special importance of "[s]trict adherence to that requirement." *Id.* (footnote omitted). "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." *Id.* at 598 (footnote omitted). The court added:

> When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.

Id.

Similarly, the provision of reasons enhances the integrity of the judicial process. Also, as stated above, by giving an explanation the courts of appeals facilitate this Court's task of deciding upon the cases that warrant review. *See Davis v. Clark*, *supra* (addressing requirement that district court give reasons).

9. The failure to give reasons permits the possibility of an idiosyncratic tendency in the growth of the law. Let us suppose that two panels are faced with the same legal question and arrive at opposite

conclusions. The direction that the law takes should not be determined by the happenstance that one panel gives reasons and the other does not. One would think that each decision is a precedent in the sense that it is "a public act of a public official." *Cf. In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988) (denies motion to vacate district court's decision after the parties have settled pending appeal).

10. We are mindful of the dictum in *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972), that the courts of appeals should have wide latitude about whether or how to write opinions. However, in the 20 years that have passed grave concerns have been expressed about the issuance of decisions without reasons. The dictum obviously was not a dispositive ruling on the question of the standards that should be employed in determining whether a decision may be issued without reasons. The issue is ripe to be addressed by this Court.

Nor will review by this Court result in burdensome tasks assigned to the courts of appeals. As Judge Tamm stated: "Such a requirement is not onerous if the matter was dealt with in a conscientious manner in passing on the merits." *Davis v. Clark*, 404 F.2d at 1358. As Judge Wald said: "A minimum opinion need not be unduly time consuming to write." 42 Md. L. Rev. at 782. *Cf.* Petition for Certiorari at 11 (quoting Chief Judge Markey on the previous practice of the Federal Circuit in explaining all of its decisions).

11. The petition for certiorari does not seek draconian relief. It asks this Court "to provide guidance to courts of appeals and litigants on this important question of judicial administration." Petition for Certiorari at 5. For this Court to take review and

provide such guidance would ameliorate a major unresolved issue of fairness and judicial administration. There would be great benefit to the bench, the bar, litigants and the public.

CONCLUSION

Amici respectfully urge this Court to grant the petition for certiorari.

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